

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

RACHEL H.,

Claimant,

vs.

SAN ANDREAS REGIONAL CENTER,

Service Agency.

OAH No. N 2006051007

DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Campbell, California, on December 11, 2006.

Claimant was present and was represented by her mother, Lisa H.

The service agency was represented by Jacques Maitre, Executive Director's Designee for Fair Hearings.

The matter was submitted for decision on December 11, 2006.

ISSUE

The issue is whether claimant is eligible for services under the Lanterman Act because of a condition that is closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation.

FACTUAL FINDINGS

1. Claimant is 23 years old. Her mother referred her to the service agency for an eligibility determination in September 2005.
2. Claimant received special education services from the Monterey Peninsula Unified School District (MPUSD) from kindergarten through her graduation from Monterey

High School. She initially received resource specialist services but was transferred into a Learning Handicapped Special Day Class at the beginning of the third grade. She continued in special day classes through graduation.

3. An MPUSD school psychologist conducted a routine special education reassessment in March 1992, when claimant was eight years old and in the second grade. The report indicated claimant had been diagnosed with Attention Deficit Hyperactivity Disorder for which she was taking Ritalin. It was noted that symptoms of ADHD (distractibility, poor attention span and high activity level) had improved since she began taking the medication but nevertheless persisted. On the Wechsler Intelligence Scale for Children-Third Edition (WISC-III), claimant achieved a verbal IQ score of 82, a performance IQ score of 94 and a full scale IQ score of 86. The psychologist noted that this placed claimant in the low average range of capacity for cognitive learning, that this was an improvement over testing three years earlier – perhaps related to claimant’s improved ability to attend to the test since she had begun taking medication – and that claimant’s low academic skills were “due to factors other than a limited capacity for cognitive learning.”

4. Another MPUSD school psychologist assessed claimant in April 1995, when she was 11 years old and in the fifth grade. Again administered the WISC-III, claimant achieved scores nearly identical to those three years earlier: 84 verbal, 90 performance, 86 full scale. Again, it was noted that claimant’s “aptitude for academic learning” was in the low average range. The psychologist described claimant as having a “significant learning disability” that included deficits in spatial relationships, fine motor coordination, visual-motor integration and vision and auditory perception, weaknesses in gross motor skills, and auditory processing problems. He also noted, “[Claimant’s] ability to function successfully increases dramatically when she takes medication for ADHD. Her present dosage, however, appears to wear off before the middle of the school day. The effectiveness of the medication should be reviewed by her physician; an adjustment of the dosage may be indicated.”

5. An MPUSD school psychologist again assessed claimant in March 2000, when she was 16 years old and in the tenth grade. It was noted that claimant was no longer taking medication for ADHD. On the Wechsler Abbreviated Scale of Intelligence (WASI), claimant achieved a verbal IQ score of 102 (average range), a performance IQ score of 70 (borderline range), and a full scale IQ score of 84 (low average range). The examiner stated that the “distinct difference between verbal and non-verbal tasks reflects significant learning disabilities associated with attention and visual perception.” On the Wide Range Achievement Test-Revision 3 (WRAT-3), claimant scored well below grade level. She had a grade equivalent of seventh grade in reading, sixth grade in spelling, and fourth grade in arithmetic.

6. At the request of claimant’s mother, a school district psychologist administered another battery of tests in August 2001 to prepare for claimant’s transition out of high school the following spring. On the Wechsler Adult Intelligent Scale-Revised, claimant achieved a verbal IQ of 80, a performance IQ of 84, and a full scale IQ of 80. The psychologist stated that claimant’s cognitive skills “reflect borderline abilities and are

mirrored in her academic assessment,” which showed grade equivalences ranging from 2.8 in math reasoning to 8.3 in spelling. Most were in the fifth to seventh grade range. It was noted that claimant’s “adaptive skills are even more impacted than her cognitive data would suggest. She has difficulty with peer and adult relationships, overly relying on adult guidance and being a ‘follower’ with her peers.” Among his recommendations, the psychologist stated, “Semi-independent living resources through Monterey County Department of Social Services should be investigated for [claimant.] Her borderline cognitive skills may preclude these services as they have eliminated the possibility of San Andreas Regional Center Services for Handicapped Adults.”

7. After high school, the Department of Rehabilitation referred claimant to Monterey Peninsula College, where she received special education services. She attended the school for about two years, but often simply did not show up for class. She briefly held a couple of stock clerk jobs, but her performance was generally unsuccessful. Claimant dropped out of school and joined the California Conservation Corps. She had a boyfriend there and became sexually active. Both respondent and her boyfriend, who reportedly also has cognitive skills in the borderline range, were subsequently “fired” from the Corps, although the circumstances of that are in dispute. Claimant returned to live with her mother in Monterey.

8. Claimant’s intake assessment by the service agency took place on September 24, 2005, just after claimant had returned to live with her mother. Service agency psychologist Neil A. Hersh, Ph.D., participated in that assessment. On February 17, 2006, Dr. Hersh, after reviewing the test data discussed above, issued his conclusion that claimant was not eligible for regional center services by reason of mental retardation, autism, or a condition requiring treatment similar to that required by mentally retarded persons.

9. On February 27, 2006, on referral from the service agency, claimant was assessed by psychologist Arnold E. Herrera, Ph.D. As noted in Dr. Herrera’s report, although Dr. Hersh had already concluded claimant was ineligible for services, “the current evaluation was carried out in an effort to provide even more contemporaneous scores to assess whether developmental delay was present.” To that end, Dr. Herrera administered the Wechsler Adult Intelligent Scale-III (WAIS-III), the WRAT-3, and the Vineland Adaptive Behavior Scales.

On the WAIS-III claimant achieved a verbal IQ score of 84, a performance score of 89 and a full scale score of 85. Claimant’s full scale score placed her in the low average range. Dr. Herrera noted that claimant’s verbal and performance scores on this test were “in reverse” of the WASI scores obtained in 2000. Comparing the two tests, claimant’s verbal score had decreased from 102 to 84, while her performance score had increased from 70 to 89. This “reinforced” Dr. Herrera’s impression that “emotional/behavioral factors [were] causing the variability across testing.” This “contraindicated” mental retardation.

On the WRAT-3 claimant achieved scores almost identical to those of the 2000 WRAT-3 administration: a seventh grade equivalency in reading and a fifth grade

equivalency in arithmetic. Dr. Herrera found these scores “inconsistent with mental retardation.” Claimant’s scores on the Vineland, which were based upon her mother’s responses, were 84 in Communication, 79 in Socialization, and 87 in Daily Living Skills. These scores were in the low average range, trending toward average.

Dr. Herrera concluded that claimant had a learning disorder and ADHD. He noted:

While there has been variability across the last three psychological evaluations, [claimant] once again displayed functioning clearly above the delayed range, her current scores low average to average. Academic skills are mixed but also inconsistent with mental retardation. She does appear to be weakest in math. Variability within and between testing reflected the impact of emotional/behavioral issues including attention and low self-esteem. Adaptive skills are above the delayed range especially self-care abilities which trended toward average in contrast to low average socialization skills reflecting the aforementioned adjustment issues. Mental retardation is not present or functioning similar to. [Sic.]

10. Sometime after Dr. Herrera’s assessment in February 2006, claimant moved out of her mother’s home and went to Stockton with her boyfriend. They were homeless for a time and were arrested for a break-in in an attempt to get food. Claimant was seven months pregnant. Following an evaluation by a psychiatrist, claimant was found incompetent to stand trial and was referred to the county’s “Mental Health Court.” She began receiving supportive services from San Joaquin County Mental Health Services. These services are designed to keep claimant safe and to help her reach competence to stand trial. Mental Health Court liaisons Linda Cooper and Tamara Mays have been working with claimant toward these goals. When she began working with her, Mays found claimant was “not capable of doing anything for herself.” She needed assistance in making appointments and in getting to appointments. She needed to be reminded to take her prenatal vitamins. The house in which claimant and her boyfriend lived was a mess. Claimant exhibited unsafe behavior, first allowing a homeless woman to come into the house, then walking the woman back downtown at midnight. This occurred when claimant was eight months pregnant. Moved to a women’s shelter, claimant was asked to leave out of fear she would burn the place down after she tried to heat a can in the microwave.

Claimant’s baby was born two weeks before this hearing. Because claimant and her boyfriend were deemed incapable of caring for the baby, Child Protective Services placed the child into protective custody. The baby was placed in the custody of claimant’s boyfriend’s aunt. Claimant lives with her and helps care for the baby. Although claimant has been involved in a parenting class, she has shown an inability to use the information she has been provided. Claimant has been unable to demonstrate an understanding of her baby’s needs – she will neglect to feed the baby and does not understand why it cries. According to

Cooper, claimant does not have the reasoning and problem-solving skills to face the problems of everyday life. She does not eat properly (often she will not eat at all until reminded), does not take care of her personal hygiene, and makes poor safety-related decisions. She is unable to follow directions or to follow through with things she's been asked to do. Claimant does not understand the consequences of her actions and exhibits a "whatever happens, happens" attitude toward life. Cooper believes claimant will be unable to attain court competency.

11. Claimant has recently begun receiving SSI benefits, although the basis of her eligibility was not made clear. She was assisted in applying for those benefits by San Joaquin County Mental Health Services, whose staff members walked claimant through the process, including taking her to her interview. Those staff members needed to assist claimant in providing the necessary information.

12. Dr. Hersh testified that individuals with mental retardation exhibit globally depressed cognitive functioning. Claimant, however, has shown cognitive deficits only in specific areas. Her low performance usually occurs on subtests involving arithmetic, or those which are more easily negatively affected by distractions. This suggests attention difficulties and learning disabilities. Claimant has displayed relatively good intellectual functioning when she is not distracted or rushed. In this regard, Dr. Hersh pointed out the reference in the 1995 MPUSD report that claimant's "ability to function successfully increases dramatically when she takes medication for ADHD." Yet she appears to have stopped taking that medication in or before high school. Because claimant does not demonstrate global cognitive dysfunction, she does not require treatment similar to those with mental retardation, who do have such global dysfunction.

13. Dr. Hersh conceded that the functional and adaptive deficits claimant has exhibited while in Stockton, as testified to by Collins and Mays, are inconsistent with the clinical picture he previously had of claimant. Her current status might be attributable to the fact that she moved from her family, was living on the streets for a time with a boyfriend of limited cognitive abilities, and got pregnant, and very recently had a baby. All of this could have caused her existing disabilities "to spiral down" due to the additional mental distress and emotional disturbances. Nevertheless, Dr. Hersh concluded, claimant's current unsuccessful adaptive functioning is not attributable to mental retardation or a condition closely related to it.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act,¹ the State of California accepts responsibility for persons with developmental disabilities.² As defined in

¹ Welfare and Institutions Code section 4500 et seq.

² Welfare and Institutions Code section 4501.

the act, a developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely, that constitutes a substantial disability for the individual, and that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is commonly known as the “fifth category”: “disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals.”³

2. One of the Lanterman Act’s implementing regulations provides that a learning disability cannot constitute a developmental disability. A learning disability is defined as “a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.”⁴

3. The sole issue in this case is claimant’s eligibility under the fifth category. The court in *Mason v. Office of Administrative Hearings (Inland Regional Center)*, held that in order to be qualifying, “[t]he fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded.”⁵

4. Mental retardation is characterized by significantly subaverage intellectual functioning (i.e., an IQ of approximately 70 or below, with an onset before age 18⁶) accompanied by significant limitations in adaptive functioning in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, safety.⁷

5. Throughout her school career, claimant was identified as having learning disabilities. In the second grade it was noted that her low academic skills were due to something other than limited cognitive capacity. This same theme was reflected in special education assessments done in the fifth, tenth, and eleventh grades. At each of these assessments, claimant exhibited cognitive abilities in the low average or average range. The sole exception was her performance score of 70 in March 2000, which placed her in the borderline range. However, this was an aberrant score not reflective of claimant’s true capacity. At each of these school assessments it was determined that claimant’s difficulties

³ Welfare and Institutions Code section 4512, subdivision (a).

⁴ California Code of Regulations, title 17, section 54000, subdivision (c)(2).

⁵ *Mason v. Office of Administrative Hearings (Inland Regional Center)* (2001) 89 Cal.App.4th 1119, 1130.

⁶ Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, p. 49.

⁷ Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, p. 49.

were due to learning disabilities. Dr. Herrera's testing in 2006 was no different. Again, claimant showed variability in scores that indicated learning disabilities, and she demonstrated only moderate cognitive impairment.

6. Based upon the school assessments and upon the Vineland scores Dr. Herrera obtained, it is found that claimant's adaptive functioning was, at most, in the low average range. There is no doubt that claimant's current adaptive functioning is much lower. For whatever reason, since moving to Stockton claimant has demonstrated an inability to care for herself, much less her child. This is troubling, and claimant is clearly in need of supportive services. Fortunately, she is currently receiving such services from San Joaquin County Mental Health Services. Claimant could certainly also benefit from some services that might be provided by the service agency. However, unless she meets the eligibility criteria, she is not entitled to receive those services. Considering all the evidence presented, it is found that claimant does not meet the *Mason* test of having a condition closely related to mental retardation. Nor does she require treatment similar to that provided for mentally retarded individuals. Therefore, regardless of claimant's clear need for some type of intervention and supportive services, she does not meet the eligibility requirements of the Lanterman Act.

ORDER

Claimant's appeal of the service agency's denial of eligibility for services under the Lanterman Act is denied. She is not eligible for regional center services.

DATED: _____

MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.